

Remarks

Claims 1- 32 were pending in the subject application. Claims 21, 22, 30, and 31 remain pending but withdrawn from consideration. Accordingly, claims 1-20, 23-29, and 32 are currently before the Examiner. Favorable consideration of the pending claims is respectfully requested.

Initially, claims 1-20, 23-29, and 32 have been rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-10 of U.S. Patent No. 6,689,718. Attached herewith is a Terminal Disclaimer with respect to U.S. Patent No. 6,689,718, thus rendering moot this rejection.

Claims 1-3 and 9-12 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Pettersen *et al.* [Tobacco mild mosaic virus (TMGMV) induces a lethal response in tropical soda apple (*Solanum viarum* Dunal), *Phytopathology*, June 2001, vol. 91, No. 6 supplement, pp. S71-72] in view of Sanford *et al.* (U.S. Patent No. 5,036,006). Applicants respectfully traverse.

Pettersen *et al.* cannot be used as a prior art reference because this is Applicants' own publication that published less than a year before the filing date of Application No. 09/997,054 (U.S. Patent No. 6,689,718), to which the subject application claims benefit. While the Pettersen publication includes Dr. Francis William Zettler as an author, Applicants submit herewith Declarations under 37 C.F.R. §1.132, from each of the inventors of the present application, explaining that Dr. Zettler did not contribute to the conception of the claimed invention. Thus, the Pettersen publication is not "by another" and cannot be used as prior art against the present invention. MPEP §706.06(a)(II)(C); 35 U.S.C. §§102 and 103.

Without the availability of the primary Pettersen publication, Applicants submit that this rejection must be withdrawn. Accordingly, Applicants respectfully request reconsideration and withdrawal of the rejection under 35 U.S.C. §103(a) over Pettersen *et al.* in view of Sanford *et al.*

Claims 4-8 and 13-17 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Pettersen *et al.* in view of Sanford *et al.*, and further in view of Zaitlin *et al.* (U.S. Patent No. 5,596,132). Additionally, claims 18-19 and 24-28 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Pettersen *et al.* in view of Sanford *et al.*, and further in view of Johnson, Jr. *et al.* (U.S. Patent No. 6,060,430). Claims 20 and 23 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Pettersen *et al.* in view of Sanford *et al.*, and further in view of Burnside

(U.S. Patent No. 4,223,479). Also, claim 29 has been rejected under 35 U.S.C. §103(a) as being unpatentable over Pettersen *et al.* in view of Sanford *et al.*, and further in view of Detweiler *et al.* (U.S. Patent No. 6,022,828). Applicants traverse each of these rejections.

Each of these rejections under §103(a) is based on Pettersen *et al.* as the primary reference. As discussed above, the Pettersen publication cannot be used as prior art against the claimed invention. Without the availability of Pettersen *et al.*, Applicants submit that each of these rejections must be withdrawn. Accordingly, Applicants respectfully request reconsideration and withdrawal of each of these rejections under 35 U.S.C. §103(a).

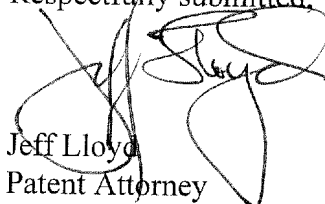
Finally, Applicants note that claim 32 is not listed under any prior art rejection and only stands rejected on the ground of nonstatutory obviousness-type double patenting. In view of the accompanying Terminal Disclaimer, Applicants believe claim 32 should be allowed.

In view of the foregoing remarks, Applicants believe that all claims as currently pending are in condition for allowance, and such action is respectfully requested.

Applicants invite the Examiner to call the undersigned if clarification is needed on any of this response, or if the Examiner believes a telephonic interview would expedite the prosecution of the subject application to completion.

The Commissioner is hereby authorized to charge any fees under 37 C.F.R. §§ 1.16 or 1.17 as required by this paper to Deposit Account 19-0065.

Respectfully submitted,



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Attachments: Terminal Disclaimer

Declaration of Dr. Charudattan under 37 C.F.R. §1.132

Declaration of Mr. Pettersen under 37 C.F.R. §1.132

Declaration of Dr. Hiebert under 37 C.F.R. §1.132